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In the Court of Criminal Appeals of Texas

Mayra Flores
Petitioner-Appellant

v.

State of Texas
Respondent-Appellee

Texas Criminal Defense Lawyers Association's *Amicus Curiae* Brief in Support of Petitioner's Motion for Court to Reconsider the Determination Not to Publish the Opinion

(Mr.) Leigh W. Davis
1901 Central Dr.
Suite 708 LB 57
Bedford, Texas 76021
817.868.9500
817.887.2401 (fax)
Texas bar no. 24029505
leighwdavis@gmail.com

TEX. R. APP. P. 11 STATEMENT

The Texas Criminal Defense Lawyers Association ("TCDLA") is a non-profit, voluntary membership organization dedicated to the protection of those individual rights guaranteed by the state and federal constitutions, and to the constant improvement of the administration of criminal justice in the State of Texas. Founded in 1971, TCDLA currently has a membership of over 3,300 and offers a statewide forum for criminal defense counsel, providing a voice in the state legislative process in support of procedural fairness in criminal defense and forfeiture cases, as well as seeking to assist the courts by acting as *amicus curiae*.

Neither TCDLA nor the attorney representing TCDLA have received any fee or other compensation for preparing this brief, which complies with all applicable provisions of the Rules of Appellate Procedure. Copies have been served on all parties.

To the Honorable Court of Criminal Appeals:

The Texas Criminal Defense Lawyers Association believes this opinion should be published and files this brief in support of the motion filed by Mayra Flores.

Under Texas Rule of Appellate Procedure 77.3 unpublished "opinions have no precedential value and must not be cited as authority by counsel or by a court." Tex. R. App. P. 77.3. But this is the sort of opinion that begs to be published. The Court's opinion leaves this issue unsettled. *See* Tex. R. App. P. 47.4. ("If the issues are settled, the court should write a brief memorandum opinion no longer than necessary to advise the parties of the court's decision and the basic reasons for it."). Obviously, Rule 47.4 does not apply to this Court, but its rationale militates strongly against this being an unpublished opinion. This is not a unanimous opinion. Far from it. The majority's opinion by Judge Walker is 19 pages long and is joined by three judges with another concurring. The dissenting opinion by Judge Yeary is 16 pages long and is joined by two judges. (One judge did not participate.) This is the first opinion by this Court about the admission of an inaccurate and incomplete recording of a conversation between a police officer and a

defendant. Were this an opinion from an intermediate court of appeals, it could not be a memorandum opinion under Rule 47.4.[1]

What's more, this opinion is well-cabined. If given precedential status, it will not lead to a flood of reversals. The recording at issue here was missing about thirty minutes of the recording. Slip Op. at 2. The opinion cautions against too broadly interpreting it: "We emphasize that our holding is based upon and limited to the specific facts of this particular case. We certainly can envision other cases involving recordings with minimal missing portions in which such recordings properly may be held to be accurate and admissible." Slip Op. at 19 n.5. Not publishing this opinion not only deprives it of precedential status but also complicates reliance on it by courts and litigants.

Appellate courts may nonetheless find it to be "illustrative and persuasive" and discuss it in their own opinions. *Jackson v. State*, 474 S.W.3d 755, 757 (Tex. App.—Houston [14th. Dist.] 2014, pet. ref'd.) cited and discussed this Court's decision in *Brewer v. State*, No. 1270–03, 2004 WL 3093224 (Tex. Crim. App. May 19, 2004) even though it

[1] This opinion would likely trigger at least two of Rule 47.4's provisions. Rule 47.4(a) precludes a memorandum opinion when the opinion "establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases[.]" Rule 47.4(b) precludes a memorandum opinion when the opinion "involves issues of constitutional law or other legal issues important to the jurisprudence of Texas[.]"

was unpublished. *Jackson* recognized the limitation of an unpublished opinion from this Court, cited Tex. R. App. P. 77.3, rejected *Brewer* as authority, nonetheless found it "illustrative and persuasive," and included a block quote from it in its opinion. *Jackson*, 474 S.W.3d at 757. A legal research database search reveals that *Brewer*, though unpublished, has been cited fourteen times. (Though one of those was by the court of appeals on remand.) This isn't an isolated occurrence. *See, e.g., Schmude v. State*, No. 13–12–00320–CR, Slip Op. at 20 n.3 (Tex. App.—Corpus Christi–Edinburg May 29, 2014, no pet.) (mem op.) ("Although the higher court's *Estrada* [decision] is not designated for publication under rule 77.3 and we are therefore prohibited from citing it as authority, see Tex. R. App. P. 77.3, we nonetheless find the court of criminal appeals's analysis of its facts … instructive to our factual analysis herein."); *Ex parte Faulkner*, No. 09–05–478–CR, Slip Op. at 2 n.2 (Tex. App.—Beaumont November 1, 2006, pet. ref'd) (mem op.) ("*Nunes* has no precedential value and we do not use it as authority; it is, nevertheless, highly instructive with regard to the recently enacted provisions contained in article 11.072. *See* Tex. R. App. P. 77.3."). Thus, this Court's not publishing an opinion only complicates reliance on it by intermediate appellate courts. To use a cliche, where there's a will, there's a way.

On the other hand, sometimes intermediate appellate courts respect Rule 77.3. For example, in a Second Court of Appeals' opinion denying an application for a writ of mandamus to direct the trial judge to give credit for time spent in custody before sentencing on a state jail felony, the concurring opinion noted the only applicable decision from this Court was unpublished and non-precedential. *In re Craven*, No. 02–09–00243–CV, Slip Op. at 5 n.2 (Tex. App.—Fort Worth November 13, 2009, no pet.) (mem. op.; not designated for publication) (Walker, J., concurring). But this leads to a bigger concern.

When this Court does not publish opinions, it can leave unnecessary voids in the State's criminal jurisprudence that appellate courts and litigants must grapple with. *In re Craven* is a good example. The question there was whether a defendant had to receive credit on his sentence for time spent in jail on a state jail felony before sentencing. Subsection 15(h) of article 42.12 apparently grants that discretion to the trial judge. Several intermediate courts of appeals have, in published and unpublished decisions, held that it does grant this discretion. *In re Craven*, Slip Op. at 5 (citing two published and two unpublished cases). This Court reached that conclusion in *Ex parte Caraway*, Nos. WR-70932-01, WR-70932-02, Slip Op. at (Tex. Nov. 5, 2008) (order) ("On a state jail felony, credit for such time is discretionary with the

trial court."), but its unpublished status precludes reliance on it. *In re Craven*, Slip Op. at 5 n.2.[2] This is not an isolated instance.

Sometimes, the failure to publish an opinion precludes or at least hampers the application and implementation of this Court's decisions. In *Lewis v. State*, Nos. 12-09-00297-CR, 12-09-00298-CR, 12-09-00299-CR, 12-09-00300-CR (Tex. App.—Tyler July 30, 2010, no pet.), the Tyler Court of Appeals addressed, among other issues, improper jury argument to which the appellant had not lodged an objection. Relying on *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996), *Lewis* held that the failure to object forfeited the error for appeal. *Lewis*, Slip Op. at 4. *Lewis* also noted that this improper jury argument was not fundamental error but could only rely on this implication from *Cockrell* since this Court's decisions holding as much were unpublished:

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[2] In addition to Tex. Code Crim. Proc. art. 42.12, § 15(h)(2), *Ex parte Caraway* also cited *Ex parte Harris*, 946 S.W.2d 79 (Tex. Crim. App. 1997) for support of this proposition. However, *Ex parte Harris's* holding went to whether a defendant could be denied time credit when unable to make bond: "[T]he Fourteenth Amendment requires that inmates receive credit for their pretrial jail time if they had been unable to post bond due to their indigence, even though the relevant statute provided that the award of such credit was discretionary with the trial court. The record reflects that Application was unable to post bond due to his indigence and he was sentenced to the maximum sentence. Thus, he is entitled to credit for this time period." *Ex parte Harris*, 946 S.W.2d at 80.

> In two recent opinions, the court of criminal appeals has specifically stated that the fundamental error exception to a defendant's failure to object to improper prosecutorial argument as set forth in *Willis v. State*, 785 S.W.2d 378, 385 (Tex. Crim. App. 1989) was overruled by the court's holding in *Cockrell*. However, these opinions, which were issued in 2009 and 2010 respectively, are unpublished. As a result, we cannot cite them as authority. *See* Tex. R. App. P. 77.3.

Lewis, Slip Op. at 4 n.1. Thus, sometimes the unpublished decision effectively just does not exist.

In *Turner v. State*, 87 S.W.3d 111, 115 (Tex. Crim. App. 2002), the appellant complained about the prosecutor's discussing potential parole law changes during voir dire. Turner cited this Court's decision in *Burton v. State*, No. 73,204, (Tex. Crim. App. March 7, 2001) (op. on reh'g) (unpublished), which had held that it was improper for the prosecution during closing jury arguments to inform the jury that a life-sentenced defendant could "walk the streets" in less time than what current law provided because of possible future legislative changes to the parole laws. Regrettably, Turner could not rely on *Burton*: "Unpublished decisions, however, have no precedential value." *Turner*, 87 S.W. 3d at 115 (citing Tex. R. App. P. 77.3). Thus, Turner could not rely on *Burton* to make this argument. This is a not uncommon occurrence.

In *Alford v. State*, 358 S.W.3d 647, 656–57 (Tex. Crim. App. 2012), this Court noted that *Ramirez v. State*, No. AP–75,167, 2007 WL 4375936, 2007 Tex. Crim. App. Unpub. LEXIS 610 (Tex. Crim. App. Dec. 12, 2007) (not designated for publication) "appears to be the only case in which this Court has directly analyzed and applied the booking-question exception, but, as an unpublished opinion, it has no precedential value." *Alford*, 358 S.W.3d at 657 (citing *Ramirez*, 2007 WL 4375936 at *15). Because of this there were varied only opinions from intermediate appellate courts on the booking exception: "Texas courts of appeals have varied widely in their interpretation and application of the exception." *Alford*, 358 S.W.3d at 657.

Sometimes not publishing an opinion requires the Court to revisit the issue. In *Holmes v. State*, 248 S.W.3d 194 (Tex. Crim. App. 2008), this Court granted review "to clarify precedent from this Court." In an unpublished opinion, *Hromadka v. State*, No. 1329-00, 2003 WL 1845067 (Tex. Crim. App. April 9, 2003) (not designated for publication), this Court had held that a defendant's "failure to object to the admission of evidence did not waive her right to a jury instruction under Article 38.23." *Holmes*, 248 S.W.3d at 196. *Holmes* made it official: "Today we affirm the validity of those holdings." *Id.* But courts

and litigants were left without a precedential answer for five years, and this Court had to revisit the issue.

In sum, this Court should publish this opinion. It is the Court's first opinion on an important issue that is far from settled. The Court's holding is well-cabined—it won't lead to a flood of reversals. Publishing this opinion will fill this void in the State's jurisprudence and facilitate further consideration of the issue and where its parameters fall—*i.e.* what less than a missing thirty minutes will preclude admission of a recording. Without publication, courts are left to shuck and jive around this lack of precedential status by finding the reasoning "illustrative and persuasive" to consider this. Therefore, TCDLA urges the Court to publish this opinion.

Conclusion

Petitioner respectfully prays that this Court will grant Flores's motion and publish this opinion.

Respectfully submitted,

/s/ Leigh W. Davis_____
(Mr.) Leigh W. Davis
1901 Central Dr. Suite 708
Bedford, Texas 76021
817.868.9500
817.887.2401 (fax)
Texas bar no. 24029505
leighwdavis@gmail.com

Certificate of Service

I hereby certify that a copy of this brief has been served on the following persons or parties on June 22, 2018:

Daniel McCrory
Harris County District Attorney Office
1201 Franklin Street
Houston, Texas 77002
mccrory_daniel@dao.hctx.net

Stacey M. Soule
State Prosecuting Attorney
P.O. Box 13046
Capitol Station
Austin, Texas 78711
information@spa.texas.gov

Ralphaell V. Wilkins
4606 San Jacinto
Houston, Texas 77004
rwilkins@thewilkinslawfirm.net

/s/ Leigh W. Davis_____
(Mr.) Leigh W. Davis

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This document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), if applicable, because it contains 2,278 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

/s/ Leigh W. Davis_____
(Mr.) Leigh W. Davis